ABDUL AZIZ MOHAMED GINAN & ORS A

v.

DATUK BANDAR KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-21-221-2006]
21 FEBRUARY 2007

CIVIL PROCEDURE: *Injunction - Interim injunction - Principles in* C
American Cyanamid v. Ethicon Ltd and Keet Gerald Francis Noel John v. Mohd Noor Abdullah applied in granting interlocutory injunction pending determination of action - Whether there are serious issues to be tried to justify granting of interlocutory injunction - Balance of convenience favouring plaintiffs - Whether damages would not be an adequate remedy D
since plaintiffs will lose their houses if interlocutory injunction not granted

CIVIL PROCEDURE: *Injunction - Suit against local government - Whether local authorities subject to injunctions - Courts have power to grant interlocutory injunctions against Datuk Bandar - Datuk Bandar not* E
Government of Malaysia or a department of Government

CIVIL PROCEDURE: *Action - Commencement - Action for injunctive relief against Datuk Bandar in relation to decision to demolish squatters - Whether grounded upon public law - Whether action should have been* F
brought by way of judicial review and not ordinary action - Rules of the High Court 1980, O. 53 - Whether an abuse of process

LOCAL GOVERNMENT: *Buildings - Demolition - Demolishment and removal of squatters - Huts and removal of squatters - Whether* G
reg. 4 of the Essential (Clearance of Squatters) Regulations 1969 can only be invoked if land in question is State land

LOCAL GOVERNMENT: *Squatters - Removal of - Demolishment of squatter huts - Whether notices issued by local authority valid - Legal burden on local council to ensure notice is properly and legally served -* H
Whether notice bad in law for containing insufficient information

The plaintiffs, residents of Kampung Semarak and Kampung Loke Yew, filed this suit after they were issued by the defendant with notices stating that the defendant intended to demolish their I
houses and that they were to vacate and demolish their houses within seven days. The only reason given for the intended demolition was to make way for a highway project (the DUKE

highway project). The notice did not say that the plaintiffs had contravened any law. The plaintiffs contended that the defendant had no legal right to demolish their houses and that the notice amounted to a threat to interfere with their proprietary rights and to commit the tort of trespass on them. The plaintiffs sought an injunction to restrain the Datuk Bandar from demolishing their houses. The plaintiffs also sought an interlocutory injunction to restrain the defendant from demolishing their houses pending the trial and determination of this suit. The defendant contended that the plaintiffs' writ was an abuse of the process of court as the plaintiffs should have commenced the action by way of judicial review by invoking O. 53 of the Rules of the High Court 1980.

Held:

(1) Applying the principles in *American Cyanamid v. Ethicon Ltd* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, an interlocutory injunction was granted pending the determination of this action. (para 8)

(2) In order to invoke reg. 4 of the Essential (Clearance of Squatters) Regulations 1969 ('the Squatter Regulations'), it was incumbent upon the defendant to satisfy the court, among other requirements, that the land upon which the plaintiffs' houses were located was State land. Whether the plaintiffs' houses were on State land or whether they were on alienated land was a serious issue to be tried. The evidence adduced by the defendant to show that the land was State land was weak. (paras 19 & 20)

(3) Whether or not the plaintiffs were entitled to invoke the doctrine of legitimate expectation and thus entitled to be given reasonable notice was a serious question to be tried as the plaintiffs claimed that they have been residing in Kampung Semarak and Kampung Loke Yew since the early 70s and that their occupation had been recognized, encouraged and supported by the defendant. (para 35)

(4) Whether the notices issued by the defendant were legally reasonable and proper was a serious issue to be tried. Short notice (seven days) was given. There was nothing in the notices stating that the plaintiffs' houses were built on State land or that the houses were not built in accordance with

plans approved of the defendant. All that was stated in the notice was that the plaintiffs' houses were affected by the highway project, and a vague reference to the Squatter Regulations. (paras 39 & 40)

(5) Whether or not the notices were properly served on the plaintiffs was a serious issue to be tried. The legal burden was on the defendant to satisfy the Court that service of the notice was properly and legally effected. No affidavit of service was filed. The information on the notice on service was very sketchy. As a consequence, a serious question arose as to whether the service of the notice was bad in law. (para 41 & 45)

(6) The project had been privatized. There was a serious arguable point as to whether the project could still be called a 'Government project'. However, even if the project was held to be a Government project, the court still had the power to grant the interlocutory injunction since this interlocutory injunction was not directed to the Government but to the defendant. The defendant is not the Government of Malaysia or a department of the Government. (paras 54 & 55)

(7) The balance of convenience favoured the plaintiffs. If the interlocutory injunction was not allowed they were going to lose their homes. Damages would not be an adequate remedy here since if an interlocutory injunction was refused, the defendant would have proceeded to demolish the plaintiffs' houses. (paras 56, 58 & 64)

(8) The plaintiffs by resorting to a writ action instead of invoking O. 53 were not abusing the process of court. The present case was not one that was suitable to have been proceeded by way of O. 53 since there were many disputes as to facts. A court should be slow in holding such a writ action as an abuse of the process of court except in cases where it is plainly obvious that the plaintiff could and ought to have proceeded by way of judicial review under O. 53. (paras 70 & 71)

Case(s) referred to:

American Cyanamid v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2) [1998] 2 CLJ 509 CA ***(refd)***

Cocks v. Thanet District Council [1982] 3 WLR 1121 ***(refd)***

Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No. 2) [2002] 6 CLJ 6 CA ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Law Quarterly Review [1983] 99 LQR 167 ***(refd)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors (No. 2) [1988] 1 MLJ 50 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

McClaren v. Home Office [1990] ICR 824 ***(refd)***

Mercury Communications Ltd v. Director General of Telecommunications and Another [1996] 1 All ER 575 ***(refd)***

O'Reilly v Mackman [1982] 3 WLR 1096 ***(refd)***

Roy v. Kensington and Chelsea Family Practitioner Committee [1992] 1 AC 624 ***(refd)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Salim Ismail v. Lebbey Sdn Bhd (No. 1) [1997] 1 CLJ 98 CA ***(refd)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***

TR Lampoh Dana & Ors v. Government of Sarawak [2005] 6 MLJ 371 ***(refd)***

Trustees of the Dennis Rye Pension Fund & Another v. Sheffield City Council [1997] 4 All ER 747 ***(refd)***

Yusuf Awang v. Datuk Bandar Majlis Bandaraya Shah Alam & Majlis Bandaraya Shah Alam [2004] 5 MLJ 360 ***(refd)***

Legislation referred to:

Essential (Clearance of Squatters) Regulations 1969, regs. 3, 4, 22

Federal Capital Act 1960, ss. 4, 5(1)

Federal Constitution, art. 13

Government Proceedings Act, s. 29(2)

Land Acquisition Act 1960, s. 8

Local Government Act 1976, s. 108(3), 166

National Land Code, s. 5

Rules of the High Court 1980, O. 53

Specific Relief Act 1950, s. 54(d)

Other source(s) referred to:
HWR Wade & CF Forsyth, Clarendon Press, Oxford, *Administrative Law*, 7th edn, pp. 680-695
The Closing Chapter, 1983 Butterworths, p. 125

For the plaintiffs - Sivarasa (Ravi Nekoo, K Parameswary & Cheng Poh Heng with him); M/s Cheng Poh Heng & Co
For the defendant - B Thangaraj (YC Lee with him); M/s Thangaraj & Assoc

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Yunus J:

[1] On 6 February, 2007, in announcing my decision in open court, I delivered a brief written judgment. I said that a full written judgment would be issued in due course. The following is my full written judgment.

[2] In the present case the plaintiffs filed the writ and statement of claim on 8 September 2006. The Datuk Bandar Kuala Lumpur is named as the defendant. The writ was filed after the plaintiffs who are the residents of Kampung Semarak and Kampung Loke Yew (but the vast majority are from Kampung Semarak) were issued by the defendant with notices stating that the defendant intends to demolish their houses to make way for the construction of a highway, and that they were to vacate and demolish their houses within seven days. All the notices are exhibited by the plaintiffs (see exh. AA12 of encl. 4). Every notice is dated 28 August 2006. The notices are all similar in their content; and a typical notice reads:

> Tuan/Puan
>
> PEMBERSIHAN SETINGGAN: DI KAMPUNG SEMARAK, SETAPAK, KUALA LUMPUR
>
> PROJEK PEMBANGUNAN: PROJEK LEBUHRAYA DUTA-ULU KLANG (DUKE)
>
> Adalah dengan ini dimaklumkan bahawa Kerajaan akan melaksanakan projek pembangunan di kawasan tersebut di atas, dan didapati bangunan yang tuan/puan duduki/gunakan sekarang adalah terlibat secara langsung dengan perlaksanaan projek tersebut.

2. Maka dengan hal yang demikian atas kuasa-kuasa yang diberikan kepada saya di bawah PERATURAN-PERATURAN PERLU (PEMBERSIHAN SETINGGAN-SETINGGAN) 1969 yang meliputi kawasan Wilayah Perseketuan Kuala Lumpur, dengan ini memberi tuan/puan tempoh 7 (TUJUH) hari dari tarikh penerimaan notis ini supaya berpindah dan mengosongkan serta merobohkan bangunan dan apa-apa sambungan atau binaan di atas tanah yang tuan/puan duduki/gunakan sekarang.

3. SILA AMBIL PERHATIAN bahawa jika tuan/puan gagal mengosongkan tapak tersebut dalam masa yang ditetapkan, jabatan ini akan mengambil tindakan merobohkan bangunan tersebut dan menuntut semua kos kerja daripada tuan/puan.

Sekian.

'BERKHIDMAT UNTUK NEGARA'

'BERSEDIA MENYUMBANG, BANDAR RAYA CEMERLANG'

Saya yang menurut perintah

t.t.

(MUHAMAD IRWAN BIN ABDULLAH)
Penguasa
Jabatan Keselamatan Dan Penguatkuasaan
Dewan Bandaraya Kuala Lumpur
b. p. Datuk Bandar Kuala Lumpur

[3] It is significant to observe that the only reason given for the intended demolition was to make way for a highway project. The notice does not say that the plaintiffs have contravened any law.

[4] The plaintiffs are aggrieved by the notice. They contend that the defendant has no legal right to demolish their houses and that the notice amounts to a threat on the part of the Datuk Bandar to interfere with their proprietary rights and to commit the tort of trespass on them.

[5] They seek the protection of this court. They seek from this court a declaration that they have proprietary rights over their houses and an order of injunction against the Datuk Bandar to restrain the Datuk Bandar from demolishing their houses.

[6] The plaintiffs' prayers at para. 18 of the amended statement of claim at encl. 12 reads:

a. Satu deklarasi bahawa wujudnya satu ekuiti bagi pihak Plaintif-plaintif yang mana ekuiti tersebut meliputi nilai perbelanjaan pengubahsuaian tanah, rumah (termasuk kedai dan gerai), harga semasa rumah (termasuk kedai dan gerai) mereka serta kos pemindahan.

b. Satu deklarasi bahawa Plaintif-plaintif mempunyai hak milikan ke atas tanah tersebut selagi hak ekuiti mereka itu tidak ditunaikan melalui tawaran mmembeli rumah, dan pembayaran pampas an dan gantirugi yang perlu ditaksir.

c. Satu injunksi menghalang Defendan samada secara sendiri dan/atau pekerja-pekerja mereka dan/atau ejen mereka dari memasuki dan merobohkan rumah dan apa-apa bangunan yang telah didirikan oleh Plaintif-Plaintif di GRN 55820, No: Lot 28137, Mukim Setapak, Daerah Kuala Lumpur.

[7] Pending the trial of this action the plaintiffs have on 8 September 2006 filed the summons-in-chambers at encl. 3. It is an *inter parte* application by the plaintiffs for an interlocutory injunction to restrain the defendant from demolishing their houses pending the trial and determination of this suit.

[8] Applying the principles in *American Cyanamid v. Ethicon Ltd* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 CA, I granted the interlocutory injunction pending the hearing and the determination of this action.

[9] I find that there are serious issues or questions to be tried. Among the serious questions to be tried are:

(a) whether the land on which the plaintiffs' houses are sited is State land, or whether it is alienated land;

(b) assuming that the land is State land, whether the plaintiffs are, by virtue of reg. 4 of the Essential (Clearance of Squatters) Regulations 1969 ('the Squatter Regulations'), entitled to be given reasonable notice of the intended demolition;

(c) assuming that the land is State land and that the plaintiffs are entitled to be given reasonable notice, whether the notice issued is a reasonable and proper notice for the purpose of the said reg. 4;

(d) assuming that the land is State land and that the plaintiffs are entitled to be given reasonable notice, whether the notice was properly served on the plaintiffs;

(e) whether the DUKE highway project is a Government project or whether it is a private project.

Whether The Land On Which The Plaintiffs' Houses Are Sited Is State Land Or Whether It Is Alienated Land?

[10] In the present case, it is undisputed that the defendant intends to demolish the plaintiffs' houses to make way for a highway project (known as the DUKE project) to be undertaken by a private entity known as Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd (known by the acronym 'KESTURI'). The highway project is a privatized project. The intention of the defendant was made known to the plaintiffs by way of notices posted on their houses. The notices gave the plaintiffs seven days to demolish and to vacate their houses. The defendant does not state in their affidavits under which specific provision of law the intended action to demolish the plaintiffs' houses is being taken. The defendant in their affidavits merely said that the intended action is taken pursuant to the Squatter Regulations. However, Encik Thangaraj, the learned counsel for the defendant submitted that the intended action is taken pursuant to reg. 4 of the said Squatter Regulations.

[11] Regulation 4 states:

> Local authority may demolish squatter huts on State land, reserved land, mining land and forest land.
>
> 4. A local authority or its agents or servants may in respect of State land, reserved land, mining land and forest land:
>
> (a) enter by day or night any such land for the purpose of summarily demolishing any squatter hut; and
>
> (b) remove any person and moveable property in any squatter hut; and
>
> (c) summarily demolish any squatter hut on the land.

[12] Regulation 3 of the Squatter Regulations defines 'squatter hut' as follows:

'squatter hut' means any house, hut, shed, stall, lean-to, shelter, roofed enclosure or any extension or structure attached to any building or other erection, of whatever materials made and whether used for the purpose of a human habitation or otherwise which has been erected or is in the course of erection otherwise than in accordance with a plan approved by a local authority and is situated on any land.

[13] "State land" is defined by the Squatter Regulations as follows:

'State land' means State land as defined in section 5 of the Code.

[14] According to reg. 3 of the Squatter Regulations, 'Code' means the National Land Code.

[15] Section 5 of the National Land Code defines 'State land' as:

"State land" means all land in the State (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of territorial waters) other than:

(a) alienated land;

(b) reserved land;

(c) mining land;

(d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest;

[16] Section 5 of the National Land Code defines 'alienated land' as:

"alienated land" means any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land;

[17] The plaintiffs protested against the proposed action of the defendant. The plaintiffs claim that they are not squatters simpliciter; and so should not be treated as such. The plaintiffs claim that the land on which their houses are built is alienated land; a land that has been alienated to the Federal Lands

Commissioner under a title known as GRN 55820, Mukim Setapak, Lot 28137 (see exh. AA0 of the plaintiffs' affidavit at encl. 4). The plaintiffs claim that they have been living on that land since the seventies; that they are occupying the land as licensees; and that they have proprietary rights over the houses that they have built. As such, the plaintiffs contend, their houses cannot be demolished pursuant to reg. 4 of the Essential (Clearance of Squatters) Regulations 1969, since reg. 4 speaks of the exercise of powers in respect of houses on State land; whereas the plaintiffs' houses are on alienated land.

[18] The defendant, on the other hand, contends that the land over which the plaintiff's houses are built is State land; that the plaintiffs are squatters simpliciter; and that the houses were built without approved plans from the Datuk Bandar. The defendant relies on two documents exhibited as exh. HAH2 and exh. HAH3 of the defendant's affidavits at encl. 13.

[19] In my judgment, at the outset it must be stressed that as it is the defendant who intends to demolish the plaintiffs' houses, the legal burden is on the defendant to satisfy the court that the defendant is justified in doing so. On the hypothesis that the defendant is relying on reg. 4 of the Squatter Regulations, the burden then is on the defendant to satisfy the court that they are entitled to invoke the provision of the said reg. 4 and that all the requirements stipulated by the Squatter Regulations are duly complied. In order to invoke reg. 4, it is incumbent upon the defendant to satisfy the court, among other requirements, that the land upon which the plaintiffs' houses are located is State land.

[20] To my mind, whether the plaintiffs' houses are on State land or whether they are on alienated land is a serious issue to be tried. I say so because, bearing in mind that the legal burden is on the defendant, there are the following pertinent observations that I make on the affidavits evidence adduced by both sides. To begin with, the evidence adduced by the defendant to show that the land is State land is weak. There is only an assertion in the affidavits of the defendant deposed by one Hj. Azmi bin Abdul Hamid, the Deputy Director, Department of Economic Planning and Development Coordination of the defendant, that the land in question is State land. But the said Hj. Azmi is not an officer from the office of the Land Administrator of the Federal Territory of

Kuala Lumpur; nor is he an officer from the Survey Department. He is merely an officer of the defendant. Thus he is in no position to confirm to this court (or to give *prima facie* evidence) that the land in question is State land and not alienated land. However, to repeat what has been said earlier, the defendant in their affidavits relies on two documents, namely a plan (see exh. HAH2 of encl. 13) and a letter from the Land Administrator of the Federal Territory of Kuala Lumpur dated 28 September 2005 addressed to the Secretary General of the Ministry of Public Works (see exh. HAH-3 of encl. 13).

[21] I shall deal with the first-mentioned document, that is, plan HAH2 of encl. 13 first. The defendant asserts that this plan, HAH2, is a plan published in the Gazette pursuant to s. 8 of the Land Acquisition Act 1960 and that this plan supports their claim that the land in question is State land. The defendant's affidavits, however, do not give the reference number of the Gazette Notification, nor is the particular Gazette that the defendant has in mind exhibited in any of their affidavits. So, during the submissions I asked Encik Thangaraj, the learned counsel for the defendant, to produce the Gazette Notification. He agreed to do so and accordingly, on 28 November 2006, in the course of submitting, Encik Thangaraj tendered from the bar a Gazette Notification. It is Gazette Notification No: 365 dated 20 January 2005 Jil. 49 No: 2. Encik Thangaraj submitted that this is the Gazette Notification referred to by the defendant in their affidavits. However, contrary to what is claimed by Hj. Azmi in his affidavits, I find that the said notification does not publish any plan. All it says is merely:

> 2. Pelan bagi tanah-tanah dan kawasan-kawasan yang tertentu yang dinyatakan itu boleh diperiksa dalam masa waktu-waktu bekerja biasa di Pejabat Tanah bagi Daerah tempat letaknya tanah-tanah dan kawasan-kawasan itu.

[22] I note that the affidavits of the said Hj. Azmi do not state that plan HAH-2 can be inspected at the appropriate land office pursuant to para. 2 of the above notification.

[23] I further observe that what is stated by Haji Azmi in para. 6 of his affidavit at encl. 13 is contradicted by the Gazette Notification as exhibited by exh. HAH2. In his affidavit Hj Azmi avers that the date of the Gazette Notification is 26 May 2005. In his own words:

A Pelan ukuran tepat yang menunjukkan jajaran kerja DUKE yang telah digazet pada **26 Mei 2005** mengikut s. 8 Akta Pengambilan Tanah, 1960 adalah dikepil dan ditanda sebagai Eksibit "HAH2". (emphasis added.)

B **[24]** However, as I have just pointed out, if one were to examine the Gazette Notification, one would find that the date of the publication of the notification is not 26 May 2005, as averred by Hj. Azmi, but 20 January 2005.

[25] There is another disquieting aspect of the defendant's C affidavit evidence. The defendant in their affidavits does not explain the plan HAH2 at encl. 13. It would appear that the defendant expects the court to read the legend in the plan in order to understand the plan. Be that as it may, upon examining the plan HAH2 at encl. 13 together with its legend, I find that the D proposed highway cuts through State land, alienated lands owned by ordinary individuals, and federal land (which I presume is held in the name of the Federal Land Commissioner). But an important observation that I make is that there is nothing in the plan that shows that the plaintiffs' houses are built on State land. In fact E the plan makes no reference at all to the plaintiffs' houses. Thus the plan HAH2 is merely a plan showing the route and the location of the proposed highway, at the same time showing the various lands affected by the highway as well as the lands acquired for the purpose of the same.

F

[26] The defendant maintains that the land known as GRN 55820, Lot 28137 as referred to by the plaintiffs is not affected by the highway project; meaning that the plaintiffs' claim is totally baseless. But, then, if that is so, the defendant could have easily G rebut with some force the plaintiffs' claim by merely showing in plan HAH2 (or in a separate plan, if the defendant so wishes) the location of GRN 55820, Lot 28137 *vis-à-vis* the location of the project, to indicate that the lot (Lot 28137) is located outside the project area. But, alas, this is not done (on the contrary – and H significantly – the defendant's plan HAH2 shows the location of 'PT. 5843' – but this is something which I will come to in a moment).

[27] Further, I have some doubts as to whether plan HAH2 has I been approved by the land authority because in the box containing the heading:

Pentadbir Tanah Wilayah Perseketuan Kuala Lumpur

the spaces meant for the signature of the Pentadbir Tanah Wilayah Perseketuan Kuala Lumpur and of the Pegawai Petempatan are, glaringly, merely left blank. No explanation is given for the blanks.

[28] Now I come to the second document relied upon by the defendant. It is my observation that the letter exhibited by the defendant as exh. HAH3 of encl. 13 also does not support the defendant's claim that the plaintiffs' houses are built on State land. The letter is a brief letter from the Land Administrator of the Federal Territory of Kuala Lumpur to the Secretary-General of the Ministry of Public Works stating that the Jawatan Kuasa Kerja Tanah Wilayah Perseketuan Kuala Lumpur has given permission to the Ministry of Public Works to carry out works on State land for the purpose of the DUKE project. And that is all.

[29] The plaintiffs on the other hand exhibit at exh. AA0 of encl. 4 the land title search to which is attached a sketch plan of the location of the land on which they alleged their houses are situated. What is significant is that the land search and the sketch plan show that previously Lot GRN 55820, Lot 28137 was known as Mukim Setapak, HSD 79699, PT 5843. If this is so, then the claim of the plaintiffs that Lot 28137 is affected by the project cannot be summarily dismissed; for, although the defendant's plan HAH2 does not mention GRN 5582, Lot 28137, nevertheless, the plan does also mention and does show the location of 'PT 5843' at the very location where Kampung Semarak is situated. And plan HAH2 shows that the proposed highway cuts through a portion of PT 5843 at the southeastern part (coloured red and identified in the legend as 'Tanah Milik Persekutuan Yang Akan Dipohon Pelepasan Di Bawah Perkara 86 Perlembagaan Persekutuan').

[30] The plaintiffs in refuting the defendant's allegation that their (the plaintiffs') houses are not in Lot No. 28137 (or in refuting the defendant's claim that Lot 28137 is not affected by the project) also submitted an ortophoto map to show the location of Kampung Semarak and the location of GRN 55820, Lot No. 28137 (see exh. AA13 of encl.11).

[31] The defendant, in adverting and replying to the plaintiffs' ortophoto map, avers in para. 7 of their affidavit at encl. 13 as follows:

A 7. Adalah jelas daripada pelan ukur di dalam Eksibit "HAH2" bahawa tidak ada tanah persendirian yang terlibat di kawasan Kampung Semarak dan Kampung Loke Yew dan hanya yang terlibat adalah tanah Kerajaan dan **tanah milik Persekutuan. Tanah milik Persekutuan** telah diambil dan diberi pelepasan pada 6hb Mei 2005 untuk menjalankan kerja-kerja yang melibatkan projek DUKE. Salinan surat daripada Pentadbir Tanah Wilayah Persekutuan yang bertarikh 28hb September 2005 adalah dikepil dan ditanda sebagai Eksibit "HAH3". (emphasis added)

[32] Now, what is meant by 'Tanah milik Persekutuan' here? Is the deponent here referring to GRN 55820, Lot No. 28137, since although this lot is, by definition (under s. 5 of the National Land Code), 'alienated land', it is, nevertheless, 'special' as it is vested in the Federal Lands Commissioner; which means it is for the use of the Federal Government? On this matter, the defendant must be clear. However, Encik Thangaraj, the learned counsel for the Datuk Bandar, in his submission on 4 January 2007, confirmed that Lot No. 28137, from the defendant's standpoint, is not affected by the project and that the 'federal land' that was 'surrendered' for the purpose of the project is not Lot No. 28137. But be that as it may, the phrase 'telah diambil dan diberi pelepasan' in the affidavit is somewhat vague to me, and I am unable to accept exh. HAH3 (which is a rather brief and vague letter) as evidence showing 'surrendering' of land by the Federal Lands Commissioner in respect of a land held under his name to a State Authority (so as to revert to the status of State land).

Assuming That The Land Is State Land, Whether The Plaintiffs, Under reg. 4 Of The Essential (Clearance Of Squatters) Regulations 1969, Are Entitled To Be Given Reasonable Notice?

[33] Regulation 4 of the Squatter Regulations does not provide for the giving of notice. Notwithstanding this, it is the plaintiffs' contention that they are entitled to invoke the doctrine of legitimate expectation and thus entitled to be given reasonable notice. The plaintiffs rely on *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC.

[34] The defendant on the other hand takes the view that under reg. 4 they are not obliged legally to serve any notice on the plaintiffs, and that the service done by the defendant was merely on compassionate grounds (diberi secara ehsan).

[35] Whether or not the plaintiffs are entitled to invoke the doctrine of legitimate expectation is to my mind a serious question to be tried as the plaintiffs claim that they have been residing in Kampung Semarak and Kampung Loke Yew since the early 70s; and that their occupation has been recognized, encouraged and supported by the defendant. To my mind, by reason of the conduct of the defendant and other authorities *vis-a-vis* the settlements of the plaintiffs, more than mere moral issues are at stake here. Let us dwell but briefly into the history of the settlements. The initial group of settlers was mainly ex-policemen and ex-soldiers. Kampung Semarak was originally known as Kampung Relawan. Kampung Relawan was officially established by Y.B. Encik Idris Ibrahim the then MP for Setapak. Basic amenities were provided by the defendant and other authorities over the years. On 20 November 1988, the then Prime Minister launched a Bengkel Kraftangan at the Kampung co-organised by the defendant. He also officiated the surau and the tadika for the Kampung. The Prime Minister renamed the kampung as 'Kampung Semarak' and said that it would be a "model kampong" in Kuala Lumpur as well as would be his 'adopted' kampung. The defendant has also identified the kampong as Kampung Semarak on its own official road signs. Renovations for the surau were planned by the Jabatan Agama Islam Wilayah Perseketuan as recently as in October 2006.

[36] The defendant does not dispute the above facts but, however, denies that they have encouraged or supported the plaintiffs' settlements. According to the defendant all that they have done was merely providing basic amenities to the plaintiffs who the first defendant merely regards as squatters simpliciter.

[37] Notwithstanding the position taken by the defendant, it is however important to note, however, that, if not for the DUKE project, the plaintiffs have never in the past been warned about building houses without approval of the defendant or been told to demolish their houses.

[38] In fact it is also pertinent to note that prior to the issuance of the seven-day notices which I have alluded to earlier, none of the plaintiffs have ever in the past been issued with any notice by the Datuk Bandar inquiring as to whether their houses are built with plans approved by the defendant.

Assuming That The Land In Question Is State Land And That The Plaintiffs Are Entitled To Be Given Reasonable Notice, Whether The Notice Issued Is A Reasonable And Proper Notice For The Purpose Of The reg. 4?

[39] In my judgment whether the notices issued by the defendant are legally reasonable and proper is a serious issue to be tried considering the short notice (seven days) given and comparing the content of the notice with the wordings of the provision of reg. 4 of the Squatter Regulations (as set out above).

[40] Despite the wordings of reg. 4, which set out the circumstances in which the defendant may exercise the powers conferred therein, significantly there is nothing in the notices stating that the notice is issued pursuant to reg. 4 of the Squatter Regulations; or that the plaintiffs' houses were built on State land; or that the houses were not built in accordance with plans approved of the defendant. As have been pointed out earlier, all that is stated in the notice is that the plaintiffs' houses are affected by the highway project, and a vague reference to the Squatter Regulations.

Assuming That The Land Is State Land And That The Plaintiffs Are Entitled To Be Given Reasonable Notice, Whether The Notice Was Properly Served On The Plaintiffs?

[41] In my view, whether or not the notices were properly served on the plaintiffs is a serious issue to be tried. Regulation 22 of the Squatters Regulations provides as to the manner of service of the notice. This regulation prescribes:

> Service of Notices.
>
> 22. Every notice required or authorized by these Regulations to be served on any person may be served in accordance with section 385 of the Municipal Ordinance (Cap. 133).

[42] Section 385(4) of the Municipal Ordinance reads:

> (4) A notice, order, summons or document required or authorized by this Ordinance or by any rules or by-laws made thereunder to be served on the owner or occupier of any premises may be served by delivering the same or a true copy thereof to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, by fixing the notice on some conspicuous part of the premises.

[43] However, the above s. 385 has been repealed by s. 166 (read with item 5 of the Second Schedule) of the Local Government Act, 1976. As decided in *Yusuf bin Awang v. Datuk Bandar Majlis Bandaraya Shah Alam & Majlis Bandaraya Shah Alam* [2004] 5 MLJ 360 the relevant applicable provision now pertaining to the manner of service is s. 108(3) of the Local Government Act 1976. This provision stipulates:

> (3) A document required to be served on the owner or occupier of any premises shall be deemed to be properly addressed by the description of the "owner" or "occupier" of such premises without further name or description and may be served by delivering the same to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, by fixing the notice on some conspicuous part of the premises.

[44] Therefore, as a rule the notice must be served personally on the person named in the notice or to some adult member of the family of that person. In the present case, however, it is remarkable that there is no affidavit of service at all filed. On the manner of the service of the notice, all that is adduced by the defendant as evidence is the affidavit of Hj. Azmi at encl. 13. At para. 15 of the affidavit he only makes a general averment and it as follows:

> 15. ... Defendan akan selanjutnya menyatakan bahawa 'Notis Meruntuhkan Pondok Setinggan' seperti yang terdapat di dalam Eksibit AA-12 kepada Afidavit Plaintif (1) telah samada diserah secara kediri, kepada orang dewasa yang berada di pondok setinggan dan ditampal di pintu hadapan pondok setinggan sekiranya tiada orang dewasa di pondok setinggan mereka.

[45] Such a vague and general averment as this, as a matter of evidence, lacks probative value; all the more so when the deponent himself is not the server of the notice and when the notice itself displays a dearth of information on the mode of service and merely states (with the exception of one or two cases): 'Cara Penyampaian: Tampal'. It needs to be stressed here that the legal burden is on the defendant to satisfy the court that service of the notice was properly and legally effected, meaning that the notice was served on the person named in the notice personally, or it was served on an adult family member of that person. Yet in the

present case, the duty to furnish proper evidence of service before the court is not taken seriously by the defendants. As has been said, no affidavit of service has been filed. Upon scrutinizing the notices I find the information therein on service is very sketchy. The information on the notice, for whatever it is worth as a matter of evidence, indicates that it was merely pasted (the notice states: Cara Penyampaian: Tampal) onto the premises (with the exception of one or two where it was personally served to an individual). This manner of service is clearly not permitted under normal circumstances. Under s. 108(3), the notice may be stuck or affixed (or pasted) on some conspicuous part of the premises only if there was no adult member of the household to accept service. In the present case, however, no affidavit evidence is adduced by the defendant to the effect that in respect of all the plaintiffs (perhaps, with the exception of one or two) there was no adult member of the household concerned present to accept personal service of the notice. As a consequence, a serious question arises as to whether the service of the notice is bad in law.

Whether The DUKE Highway Project Is A Government Project Or Whether It Is A Private Project?

[46] This is a serious issue to be tried. It is the contention of the defendant that the DUKE project is a Government project. Hence the interlocutory injunction against the defendant prayed for in this interlocutory application, if granted, is indirectly an interlocutory injunction against the Government of Malaysia.

[47] Yet the evidence adduced by the defendant to show to this court that the project is a Government project is slender; if not mere bare assertions. At para. 7 of the affidavit of Hj. Azmi at encl. 9 he merely avers as follows (I will only quote the relevant portions):

> 7. Perenggan 14 Afidavit Plaintif (1) adalah diakui dan Defendan akan selanjutnya menyatakan bahawa Lebuhraya Duta – Ulu Kelang (selepas daripada ini dirujuk sebagai "DUKE") adalah projek yang **dilaksanakan oleh Kerajaan Malaysia**. Perkara-perkara berkaitan projek DUKE adalah seperti berikut:-
>
> 7-1. Lebuhraya DUKE sepanjang lapan belas (18) kilometer yang bermula dari North Klang Valley Expressway (NKVE) di Jalan Duta dan berakhir di Jalan Lingkaran Tengah II (MRR II) di sebelah timur Kuala Lumpur dan Batu Caves di

sebelah utara. Lebuhraya ini direkabentuk dengan lapan (8) dan enam (6) laluan dua (2) hala. Pembinaan DUKE akan dilengkapi dengan tujuh (7) persimpangan bertingkat dan empat (4) lauan susur keluar masuk.

7.2. DUKE merupakan sebahagian dari **rancangan Kerajaan Persekutuan** bagi Pelan Induk Jalan Raya Kuala Lumpur yang akan melengkapkan Jalan-jalan dari jejari bandaraya untuk mengurangkan kesesakan trafik. … (emphasis added)

[48] And at para. 8 of his affidavit at encl. 9 the same deponent avers:

8. **Kerajaan Malaysia telah melantik Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd (selepas daripada ini dirujuk sebagai "KESTURI")** bagi melaksanakan projek DUKE dan pihak Defendan adalah hanya pihak berkuasa tempatan yang dipertanggungjawabkan bagi mengalihkan dan menempatkan penghuni-penghuni pondok setinggan yang terlibat dengan projek DUKE. (emphasis added)

[49] And, of course, there is also the Land Administrator's letter, exh. HAH3 at encl. 13.

[50] The defendant cites s. 29(2) of the Government Proceedings Act 1956. This provision states:

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[51] The learned counsel for the defendant next cites *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12. In this case cited, Salleh Abas LP in interpreting s. 29(2) said (at p. 20):

Apart from this, the issue of the interim injunction against UEM is absolutely contrary to the expressed words of section 29 of the Government Proceedings Ordinance 1956, as it has in effect indirectly restrained the Government. Section 29 is as follows:

29. (1) In any civil proceedings by or against the Government the court shall … have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

A Provided that –

(a) where in any proceedings against the Government … the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;

B and

(b) …

(2) The court shall not in any civil proceedings grant any C injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

D This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This E has been the interpretation which has been placed by the courts in England as well as in this country.

[52] Now upon a close reading of all the judgments (including the dissenting judgments) in the above case it is clear that the above view is only the view of Salleh Abas LP and not the view F of the majority judgment. That this is so is clearly pointed out by the Court of Appeal in *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122 CA. But I will come to this case later. At the moment, however, I wish to refer to the unanimous oral judgment of the Supreme G Court in *Lim Kit Siang v. United Engineers (M) Bhd & 3 Ors (unreported)*, the bench comprising Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ. The judgment of this unreported case is reproduced by VC George J (as he then was) in his judgment in *Lim Kit Siang v. United Engineers & 3 Ors (No. H 2)* [1988] 1 MLJ 50. This unreported judgment reproduced is as follows:

The learned judge's interpretation of s. 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute I expressly prohibits, he ruled that the court cannot grant an injunction against a party having a transaction with the Government as in the present case. That will have the effect, he

said, of indirectly prohibiting the Government from signing the agreement. With respect we are unable to agree with the learned judge's extension of the scope of that section.

[53] In *Sabil Mulia* Gopal Sri Ram JCA in delivering the unanimous judgment of the Court of Appeal held that (at p. 331):

Proviso (a) to [section 29 of the Government Proceedings Act, 1956] has been considered in a number of cases. Some judges have interpreted the proviso to impose a complete bar to the grant of any form of injunction, whether temporary or permanent against the Federal or any State Government or its officers, including Ministers. Others have taken the view that the section only bars the grant of a permanent injunction against the Government. Principal among the cases where the former view was expressed in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 where Salleh Abas LP took the extreme view that even indirect restraints against the Government was barred by proviso (a). After setting out the s. 29 he said:

> This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

Abdul Hamid CJ (Malaya) did not go as far. He held that s. 29 affords a defence to the Government or a servant of the government to a claim for an injunction subject to compliance with the requirements therein stated. The other member of the majority was Hashim Yeop A Sani SCJ who did not deal with s. 29 at all. Both dissenting judges (Seah and Abdoolcader SCJJ) however held that s. 29 did not bar the grant of interim injunctions against the Government or its officers.

Further, a differently constituted bench of the Supreme Court (Lee Hun Hoe CJ (BORNEO), Wan Suleiman and Wan Hamzah SCJJ) in the same case reversed the decision of the High Court at Penang refusing an interim injunction against United Engineers. The oral judgment of a unanimous Supreme Court was reproduced by VC George J (as he then was) in his judgment in *Lim Kit Siang v. United Engineers (M) Bhd & Ors (No: 2)* [1988] 1 MLJ 50 as is follows:

A

> The learned judge's interpretation of s. 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute expressly prohibits, he ruled that the court cannot grant an injunction against a party having a transaction with the Government as in the present case. That will have the effect, he said, of indirectly prohibiting the Government from signing the agreement. **With respect we are unable to agree with the learned judge's extension of the scope of that section**.
>
> We have considered a number of authorities both English and local as to the question of *locus standi*. We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.
>
> For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage. We therefore allow the appeal. Costs in the cause.
>
> We would grant the Order in terms of prayers (1) and (2) of the said Summons-in-Chambers with liberty to apply to the court below.
>
> We would order that this suit be heard early before another judge. (Emphasis added.)

It is therefore plain that six out of seven judges of the Supreme Court – in the same case – were unanimous that s. 29 does not prevent an injunction being granted against a private defendant from entering into a transaction with the Government. We say 'six out of seven judges' because Abdul Hamid CJ (Malaya) appears to accept that the interpretation of s. 29 by the earlier bench (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) precluded any further agitation of the point although his own view accorded with that of the Penang High Court. Thus when all the judgments delivered by their lordships of the Supreme Court in *Government of Malaysia v. Lim Kit Siang* are interpreted, it is clear that the case is authority for the proposition that s. 29 is not an impediment to restraining a private defendant from entering into a transaction with the Government. So, in the present case, there was no reason why the fourth respondent could not have been restrained from entering into a contract with the Government to run a canteen at the first respondent hospital. It follows that the learned judicial commissioner fell into error when she held against the appellant on this part of the case.

B C D E F G H I

[54] Now, reverting to the present case, it is undisputed that the project has been privatized to a company known as Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd (KESTURI). This means that this company undertakes to carry out the construction of the proposed highway including the financing of the project as evidence by exh. HAH-5 of encl. 13. In other words, KESTURI is the concessionaire. The plan HAH-2 at encl. 13 shows that the construction works, the engineering works, and the surveying works are all done or would be carried out by the private sector. I believe it is fair to infer that payments of compensations to the landowners whose lands or properties are affected by the project and hence have to be compulsorily acquired will be borne by the concessionaire themselves, and not by the Government. Eventually when the highway is operated the tolls would be collected by the private entity that has built the highway, that is to say, KESTURI. Where a project has been privatized to a private company by the Government, it means that the Government has made a policy decision that it is feasible that the project be carried out and financed by the private sector, with the Government's role being merely to facilitate the carrying out of the project by the private entity and to be the regulatory authority. When such is the arrangement, it is to my mind a serious arguable point as to whether the project could still be called a 'Government project'. This important judicial policy decision should not be made at this interlocutory stage but should only be made by the court after a full trial, where the full facts (including as to how the project was mooted in the first place, the proposed toll rates and projected profits to be reaped by the concessionaire from the toll collections from members of the public using the highway, and the actual role of the Government of Malaysia in the whole scheme of things) are fully laid out before the court, including the terms of the concession agreement between the concessionaire and the Federal Government.

[55] In any event, even on the hypothesis that at this stage I were to make a finding of fact that the project is a Government project still it is arguable that based on the above legal analysis the court still has the power to grant the interlocutory injunction sought by the plaintiffs since this interlocutory injunction is not directed to the Government (Federal or State) or to any Government officer, but to the defendant. The defendant is not the Government of Malaysia or a department of the Government. And any adverse effect the interlocutory injunction order may have

on the Government would only be an indirect consequence. And, in law, this is permissible based on the unreported Supreme Court judgment (*Lim Kit Siang v. UEM*) and the Court of Appeal judgment in Sabil Mulia.

Balance Of Convenience

[56] In my judgment the balance of convenience favours the plaintiffs. If the interlocutory injunction is not allowed they are going to lose their homes. The plaintiffs' houses may appear humble. But there is an English saying that an Englishman's home is his castle. I will say that every man's home is his castle. This is a universal human value. A person's home how small and simple it is, still, it means everything to him and to his family. It is his life. Housing is a basic human need. Further, a man's house is his property. In this country a persons proprietary right is protected by the Federal Constitution. A person cannot be deprived of his rights to his property save in accordance with the law (art. 13 of the Federal Constitution). And it is the duty of the court to protect the fundamental rights of the citizens.

[57] The defendant argues that if the interlocutory injunction is allowed it would delay the project and that it would cause financial loss to the company carrying out the project (meaning KESTURI) at the rate of RM165,000 per day. However, in my view, this is merely a financial loss. But for the 109 plaintiffs, being persons of low or small income, to lose their houses is a greater calamity. In any case KESTURI is not a party to this proceeding and there is no explanation as to how this RM165,000 loss per day is arrived at.

Is Damages An Adequate Remedy?

[58] For the same aforesaid reasons as I have said above with regards to balance of convenience, I do not think that damages would be an adequate remedy.

[59] But the learned counsel for the defendant submits that damages would be an adequate remedy. He refers to prayers (a) and (b) of the plaintiffs amended statement of claim, and contends that the plaintiffs are only interested in compensation. It is just a matter of money, he argues.

[60] With respect I do not think that it is fair to say that the plaintiffs are merely interested in monetary compensation by merely judging the prayers. They were merely asserting their proprietary rights.

[61] In reply to Encik Thangaraj, Encik Sivara refers to *Salim Ismail v. Lebbey Sdn Bhd (No. 1)* [1997] 1 CLJ 98. In this case cited Mahadev Shankar JCA in giving the judgment of the Court of Appeal said (at p. 101):

> The subject-matter of this appeal from the applicants' point of view is their continued right to stay in their homes until their claims have been finally disposed of in a full trial. The destruction of that right cannot be adequately compensated with money. This is a special reason why a stay should be granted.

[62] Encik Sivarasa then refers to another Court of Appeal decision. It is *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No: 2)* [1998] 2 CLJ 509. In this case, NH Chan JCA said (at p. 523):

> Mr. Sivarasa for the applicants convinced us that no doubt that applicants' claim is for compensation, nonetheless if we were not to stay the respondent's vacant possession order before the hearing of the applicants' leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory. How can it not be so when what is left would be empty fields?

[63] In the same case Ahmad Fairuz JCA (as he then was) said (at p. 525):

> As to the merits of the application, I am of the view that the applicants' premises should be preserved. The destruction of their premises will, as contended in para 9 of their affidavit in support, cause them to suffer losses, hardships and difficulties which are irreparable ('mengalami kerugian, penderitaan dan kesusahan yang tidak boleh dibaiki'). I find no evidence that can show that such contention of the applicants as inherently improbable. Furthermore, the applicants in their counterclaim (see p 121 of the record) have, amongst other things, sought for a declaration that they have a right to remain on the land in question until their equities are being satisfied in the form of compensation and damages. If a stay is not granted, then, the very grant of vacant possession to

A the respondent will mean the destruction of that right. From then on, any success in the application for leave to appeal or eventually in the appeal itself will be meaningless as that right can never be restored.

B **[64]** Now, in the present case, if an interlocutory injunction is refused, the defendant will proceed to demolish the plaintiffs' houses. Then the question arises: once the houses are demolished, and in the event that at the conclusion of the trial the Court were to make a finding that the demolition of the houses was unlawful, how are the compensation to be determined? With C respect, there appears to be a hollow ring in Encik Thangaraj's argument. I accept Encik Sivarasa's argument that the above two cases cited by him support his contention that damages are not an adequate remedy in the circumstances of the case.

D **The Issue Pertaining To Judicial Review And O. 53**

[65] The defendant contends that the plaintiffs' writ is an abuse of the process of court as the plaintiffs should have commenced the action by way of judicial review by invoking O. 53 of the E Rules of the High Court, 1980. Encik Thangaraj cites the following two cases:

(a) *Shaharuddin bin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor* [2004] 4 CLJ 775 HC; and

F (b) *TR Lampoh ak Dana & Ors v. Government of Sarawak* [2005] 6 MLJ 371.

[66] This issue brings us into a very controversial area of law as the case law in England has shown. There is much uncertainty in G the law created by the landmark House of Lords cases of *O'Reilly v Mackman* [1982] 3 WLR 1096 and *Cocks v. Thanet District Council* [1982] 3 WLR 1121. In the former case, Lord Diplock said (at p. 1110):

H It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action when he would never have been granted leave to go for judicial review.

I

[67] This was a remarkable change in English law. It caused Professor Wade to remark in the *Law Quarterly Review* ([1983] 99 LQR 167-168): A

> …the law has now revolved through a full circle: the action by writ for a declaration or injunction (which the courts have done so much to encourage as an alternative to the prerogative remedies over the last 30 years) is now found to be an abuse of the court. B

[68] In the latter case (Thanet District Council) the House of Lords spoke of a 'dichotomy'. By dichotomy what the House of Lords meant was that the functions of a public authority can be C divided into two parts: one part is its public law function; the other part is its private law function. But the principles enunciated in the two House of Lords cases are fraught with difficulties and have been the subject of intense criticism by academic writers (see for example *Administrative Law* by H.W.R. Wade & C. F. Forsyth, D Clarendon Press, Oxford, 7th edn. at pp. 680-695). Even Lord Denning, who decided in *O'Reilly v. Mackman* [1982] 3 WLR 604 at the Court of Appeal stage, made the following admission on the eve of his retirement from the bench (in his book *The Closing Chapter*, 1983 Butterworths, at p. 125): E

> But how are you to decide between the two? Which is public? Which is private? Likewise its duties are divided into two. One part is its public law duties. The other part is its private law duties. But the division is very difficult to make. So difficult indeed that I can foresee an infinity of trouble arising from it. It makes me regret that the dichotomy was ever made. But still it has been done and you will have to live with it in perpetuity. F

[69] But notwithstanding these difficulties, ever since the amendment to O. 53 of our Rules of the High Court 1980 in G September 2000 (*vide* P.U.(A) 342/2000 which came into force on 21 September 2000) our Courts have been applying the principles in *O'Reilly v. Mackman*. Here, we must, however, tread with caution. Whilst on the one hand it is appreciated that the purpose of O. 53 is to provide protection to public authorities H when their act or decision is being challenged by a member of the public aggrieved by the act or decision, yet, on the other hand, just because the party sued is a public authority that has made a decision or exercised a function, does it mean that our courts must in every case strictly insists that the aggrieved party I (aggrieved by the decision or the purported exercise of that function) pursue his cause *via* O. 53 only?

[70] But to cut matter short I do not think that in the present case it can fairly be said that the plaintiffs by resorting to a writ action instead of invoking O. 53 is abusing the process of court. For one thing, even if they had wanted to invoke O. 53 they could have done so and they were within time to apply for leave (had they wanted to). But they chose to go by way of a writ action; and I think it is a preferable (if not the correct) course of action. Firstly, the present case is not one that is suitable to have been proceeded by way of O. 53 (meaning merely by way of originating summons and affidavits) since there are many disputes as to facts as shown by the above preceding discussion (and the above are merely some of the serious questions to be tried). It is, therefore, more appropriate to proceed by way of a writ action so that witnesses can be called and various issues of fact can be tried. Secondly, as already pointed out earlier, the notices are vague: under which particular regulation is the action purportedly taken by the defendant? Thirdly, from the plaintiffs' standpoint, considering the vagueness of the notices, the notices were meaningless and devoid of any legal authority and that the defendant was about to interfere with their enjoyment of their proprietary rights and to commit the tort of trespass on the plaintiffs' properties; and they wanted the court to protect their proprietary rights and to prevent the trespass from happening. In other words, they merely wanted to exercise their constitutional (see art. 13 of the Federal Constitution) and private law rights. Their constitutional and private rights are being threatened by the defendant who has not been forthright in the notices issued as to which particular regulation of the Squatter Regulations the action to demolish is being taken. Hence, they filed the writ action.

[71] In my judgment the correct principle ought to be that every person who has a cause of action against a public authority and seeking a declaration or an injunction should generally be accorded the right to proceed by way of a writ action. A court should be slow in holding such a writ action as an abuse of the process of court except in cases where it is plainly obvious that the plaintiff could and ought to have proceeded by way of judicial review under O. 53. The present case, to my mind, is not a plain and obvious case. In this regard, I am reminded of the following words of wisdom of Gopal Sri Ram JCA in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 CA:

> For myself, I must add a final word. I must be forgiven for expressing my amazement and equal disappointment that in this day and age, applications and suits are disposed of on purely technical and procedural ground without even the slightest attempt to ensure that justice according to the merits of a particular case is done. I cannot help feeling that somewhere in the performance of our duty as judges to decide according to law we have forgotten our duty to do justice according to law and the substantial merits of each case.

[72] And I must add that even in the United Kingdom there are signs of the courts watering down the harshness of the principles in *O'Reilly v. Mackman* as exemplified by the following cases:

(1) *McClaren v. Home Office* [1990] ICR 824;

(2) *Roy v. Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624; and

(3) *Mercury Communications Ltd v. Director General of Telecommunications and Another* [1996] 1 All ER 575; and

(4) *Trustees of the Dennis Rye Pension Fund and another v. Sheffield City Council* [1997] 4 All ER 747.

[73] It is interesting and useful to note that in case (4) above Lord Woolf MR laid down, *inter alia*, the following guide line:

> (2) If a case is brought by an ordinary action and there is an application to strike out the case, the court should, at least if it is unclear whether the case should have been brought by judicial review, ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at least an indication that there has been no harm to the interests judicial review is designed to protect. In addition the court should consider by which procedure the case could be appropriately tried. If the answer is that an ordinary action is equally or more appropriate than an application for judicial review that again should be an indication the action should not be struck out.

Is The Datuk Bandar A Government Department?

[74] Encik Thangaraj for the Datuk Bandar argues that the Datuk Bandar is a Government department, and as such no injunction can be issued by the court against the Datuk Bandar by reason of s. 54(d) of the Specific Relief Act 1950. Section 54(d) provides:

> Injunction when refused.
>
> 54. An injunction cannot be granted –
>
> (a) …
>
> …
>
> (d) to interfere with the public duties of any department of any Government in Malaysia …

[75] The learned counsel, in support of his contention, relies on *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No. 2)* [2002] 6 CLJ 6. The learned counsel for the plaintiffs, Encik Sivarasa, on the other hand submits that the Datuk Bandar is not a department of the Government. He refers to *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323.

[76] Now, the office of Datuk Bandar is established by s. 4 of the Federal Capital Act 1960. His function is to administer the City of Kuala Lumpur. He is a corporation sole by virtue of s. 5(1) of the Federal capital Act. He has his own legal personality independently of the Government; and, independently of the Government, he may sue and be sued. He may enter into contracts. He has a common seal. The Datuk Bandar is a local authority for the purposes of the Local Government Act 1976. The functions, powers and duties of the Datuk Bandar, as a local authority, are set out in the Federal Capital Act and, more extensively, in the Local Government Act. In my judgment, having examined the provisions of the Federal capital Act and the Local Government Act, I take the view that the Datuk Bandar is a mere statutory authority, a local government; but it is not a department of the Government like, say, the Road Transport Department, the Immigration Department, the Police Department or the Department of Customs and Excise. It is not a department of the Government for the purpose of s. 54(d). In so holding I adopt the view and analysis of Edgar Joseph Jr. J (as he then was) in *Tan Suan Choo*. I do not propose to say more.

Where The Defendant (Against Whom An Interlocutory Injunction Is Sought) Is A Public Authority, Is The Test Different From That As Laid Down In American Cyanamid?

[77] Encik Thangaraj for the defendant submits that the 'serious issue to be tried' test, as laid down in *American Cyanamid*, does not apply in the present case as the Datuk Bandar is a public authority. He contends that the test should be: whether the plaintiffs have a real prospect that they will succeed in their claim for a permanent injunction at the trial. Learned counsel refers to a passage in the judgment of Lord Denning MR in the English Court of Appeal case of *Smith v. Inner London Education Authority* [1978] 1 All ER 411 where his lordship states (at p. 418):

> Lastly, a word about *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 which we have so often. Counsel for the authority said that it should be confined to actions between parties in private law; and should not be extended to cases against local authorities in public law. I see some merit in this suggestion, especially in view of *F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1974] 2 All ER 1128; and also when one is considering the respective compensation in damages. But without going into detail, I am of opinion that local authority should not be restrained, even by an interlocutory injunction, from exercising its statutory powers or doing its duty towards the public at large, unless the plaintiff shows that he has a 'real prospect of succeeding in his claim for a permanent injunction at the trial'.

[78] The learned counsel also refers to the judgment of Abdul Malik Ishak J in *Ganad Media Sdn Bhd*.

[79] Encik Sivarasa for the plaintiffs on the other hand submits that *Smith v. Inner London Education Authority* does not change the law even where the entity involved is a public authority. He argues that the *American Cyanamid* principles still apply in such a situation. He refers to the judgment of Browne LJ in the same case where the learned judge said (at p. 419):

> The first question is whether the plaintiffs have satisfied the first requirement laid down by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504: is their action not frivolous or vexatious? Is there a serious question to be tried? Is there a real prospect that they will succeed in their claim for a permanent injunction at the trial? The first two questions were clearly intended to state the same test, because they are joined by the phrase 'in other words', and the third cannot, I think, have been meant to state any different.

A Counsel for the authority submitted that the test should be different and the burden on the plaintiffs higher when the defendant is a body performing public duties; he says that in such cases a plaintiff should be required to go further and establish a *prima facie* case or a strong *prima facie* case. I cannot agree that on this part of the case the nature of the defendant makes any difference, though it may be important when one comes to the balance of convenience.

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[80] With respect, I am in agreement with Encik Sivarasa.

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